SUPREME COURT OF THE UNITED STATES.

No. 116. October, 1902.

HENRY BIGELOW WILLIAMS et al.

v.

HERBERT PARKER, ATTORNEY-GENERAL OF MASSACHUSETTS.

BRIEF FOR THE DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This is an information by the Attorney-General of the Commonwealth of Massachusetts to prevent the erection and maintenance of that portion of a building on Copley Square in the city of Boston which has been erected above the limit of height prescribed by Chapter 452 of the Acts of the Legislature of Massachusetts for the year 1898. This act is as follows: —

AN ACT RELATIVE TO THE HEIGHT OF BUILDINGS ON AND NEAR COPLEY SQUARE IN THE CITY OF BOSTON.

Be it enacted, etc., as follows: —

SECTION 1. Any building now being built or hereafter to be built, rebuilt or altered in the city of Boston, upon any land abutting on St. James avenue, between Clarendon street and Dartmouth street, or upon land at the corner of Dartmouth street and Huntington avenue, now occupied by the Pierce Building, so-called, or upon land abutting on Dartmouth street, now occupied by the Boston Public Library building, or upon land at the corner of Dartmouth street and Boylston street, now occupied by the New Old South Church building, may be completed, built, rebuilt or altered to the height of ninety feet, and no more; and upon any land or lands abutting on Boylston street, between Dartmouth street and Clarendon street, may be completed, built, rebuilt or altered to the height of one hundred feet, and no more: *provided, however*, that there may be erected on any such building, above the limits hereinbefore pre-

scribed, such steeples, towers, domes, sculptured ornaments and chimneys as the Board of Park Commissioners of said city may approve.

SECT. 2. The provisions of chapter three hundred and thirteen of the acts of the year eighteen hundred and ninety-six, and of chapter three hundred and seventy-nine of the acts of the year eighteen hundred and ninety-seven, so far as they limit the height of buildings, shall not be construed to apply to the territory specified and restricted in section one of this act.

SECT. 3. The owner of or any person having an interest in any building upon any land described in section one of this act, the construction whereof was begun but not completed before the fourteenth day of January in the current year, who suffers damage under the provisions of this act by reason or in consequence of having planned and begun such construction, or made contracts therefor, for a height exceeding that limited by section one of this act for the locality where said construction has been begun, may recover damages from the city of Boston for material bought or actually contracted for, and the use of which is prevented by the provisions of this act, for the excess of cost of material bought or actually contracted for over that which would be necessary for such building if not exceeding in height the limit prescribed for that locality by section one of this act, less the value of such materials as are not required on account of the limitations resulting from the provisions of this act, and the actual cost or expense of any re-arrangement of the design or construction of such building made necessary by this act, by proceedings begun within two years of the passage of this act, and in the manner prescribed by law for obtaining payment for damages sustained by any person whose land is taken in the laying out of a highway in said city.

SECT. 4. Any person sustaining damage or loss in his property by reason of the limit of the height of buildings provided for in this act, may recover such damage or loss from the city of Boston, by proceedings begun within three years of the passage of this act, and in the manner prescribed by law for obtaining payment for damages sustained by any person whose land is taken in the laying out of a highway in said city.

SECT. 5. This act shall take effect upon its passage. (Approved May 23, 1898.)

The Supreme Judicial Court of Massachusetts upheld the information and ordered that the offending portion of the building be removed. The decree in full is found upon pages 50 and 51 of the record. The plaintiffs in error duly objected that the Act was in conflict with the Fourteenth Amendment of the Constitution of the United States, and this case is now brought to this Court on a writ of error by the original defendants to determine whether the said Act is, or is not, in conflict with the Fourteenth Amendment.

The defendant in error has been notified by counsel for the plaintiffs in error that their argument will be limited to the first

six assignments of error, which raise merely the question whether or not the statute in question deprives the plaintiffs in error of their property without due process of law.

I.

The Statute Provides for Ample Compensation for any Injury to Property Due to Its Enactment.

In considering the question whether the Massachusetts statute in question is in conflict with the Federal Constitution, it is to be observed that that statute attempts fully and carefully to prescribe the remedies open to the parties injured by the passage of the Act, so as to give them full and complete compensation. Section 3 of the Act provides at considerable length for the payment of damages incurred by any person, and by the plaintiffs in error in particular, through any change in the construction of a building in process of erection at the passage of the Act. It is submitted that this provision is full and complete, and provides for every contingency of loss.

Furthermore, Section 4 gives a sweeping remedy to any person injured by the passage of the Act. It is submitted that the two provisions together cover every possible element of loss which has been suffered by these plaintiffs in error, if indeed there is any loss for which they can recover.

II.

The Act was Passed under the Police Power of the Legislature, and Compensation was Unnecessary.

We submit that it was entirely within the province of the Legislature of Massachusetts to pass this statute, basing it upon the police power inherent in every government. The statute does no more than hundreds of other such acts have done, the constitutionality of which has never been questioned, in limiting the height of buildings within certain localities.

The competency of the Legislature to pass such acts has never been doubted.

People *ex rel.* Kemp *v.* D'Oench, 111 N. Y. 359.

Such enactments are for the safety, comfort and convenience of the people, and for the benefit of property owners generally.

Knowlton *v.* Williams *et al.*, 174 Mass. 476. (Rec., p. 55.)
Commonwealth *v.* Colton, 8 Gray, 488.
Salem *v.* Maynes, 123 Mass. 372.

It is not essential that such a regulation should apply to all parts of the community, but the Legislature may, if it sees fit,

select a limited portion of some city or town to which such regulation shall apply.

Watertown *v.* Mayo, 109 Mass. 315.
Salem *v.* Maynes, 123 Mass. 372.

Such a legislative limitation is both "wholesome" and "reasonable," which is the only limitation put by the courts upon the exercise of the police power.

Commonwealth *v.* Alger, 7 Cush. 53, at p. 85, by Shaw, C. J.
Sawyer *v.* Davis, 136 Mass. 239.

The test which has been laid down by this court has been the maxim *sic utere tuo ut alienum non lædas*, and the Legislature always has the power to prevent an individual from doing any act upon his property which will be to the injury of the public.

Munn *v.* Illinois, 94 U. S. 113.
Mugler *v.* Kansas, 123 U. S. 623.
Crowley *v.* Christensen, 137 U. S. 86.

In Lawton *v.* Steele, 152 U. S. 133, this court in discussing the limits of the police power, and after specifying certain examples of the exercise of that power, says, "Beyond this, however, the state may interfere whenever the public interests demand it, and in this particular a large discretion is vested in the Legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests. To justify the state in thus interposing its authority on behalf of the public, it must appear, first, that the interest of the public generally is distinguished from those of a particular class requiring such interference, and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."

It is clear from the allegations of the information as admitted in the agreed statement of facts, that this case comes within this limitation. We have here a public square surrounded by public buildings, in themselves of great value, filled with treasures of literature and art of practically priceless value. The danger from fire to these public buildings was an entirely sufficient basis for passing this statute. Furthermore, the importance of an adequate supply of light to the Art Museum and Public Library, as well as to the public square and adjacent streets, was, in itself, an entirely adequate basis for the passage of this statute.

It is entirely immaterial that the Legislature in its generosity chose to make compensation to the owners of property injured by the passage of this Act, because the making of compensation is not incident to the exercise of police power, and the fact that compensation is given does not, and cannot, change the particular power under which the Legislature acted.

III.

The Statute Regarded as an Exercise of the Power of Taking by Eminent Domain.

It is true that this provision for compensation does conform to the constitutional requirement for the taking of property by the right of eminent domain, and if the court looking at all the circumstances should think that it was the intention of the Legislature to take certain rights in light and air and in the view over adjacent land, above the line to which buildings may be erected, in the nature of an easement annexed to the streets and public squares adjoining, the statute is in all respects in accordance with the rules regulating the taking of property by right of eminent domain. Whatever contention the plaintiffs in error may make as to whether Copley square is in a technical sense such a park as was contemplated by the statutes of Massachusetts providing for the establishment of public parks, there can be no question that, under the deeds of conveyance under which the city took the land comprising Copley square, it is a park in the popular sense, and is at any rate an open square belonging to the public, and to be used by it certainly under the limitations of the deeds conveying it.

Copley Square is clearly a public park within the definitions in the adjudicated cases.

"A park is a piece of ground enclosed for purposes of pleasure, exercise, amusement or ornament."

Perrin *v.* N. Y. Central R. R. Co., 36 N. Y. 120, 124.

A park is "a place for the resort of the public for recreation, air and light."

Price *v.* Inhabitants of Plainfield, 40 N. J. L. 608, 613.

"The term park signifies an open space intended for the recreation and enjoyment of the public."

Archer *v.* Salina City, 93 Cal. 43, 50.

A park need not necessarily be open to the public. It may be "intended to be kept open for prospect, air and light, or as a protection against the spread of fires, and other purposes, and not intended to be entered upon or used by travelers."

Foster *v.* Park Commissioners, 133 Mass. 334, 335.

IV.

The Statute in Question Provides Fully for Due Process of Law for Any Injured Party.

The question "What is due process of law" has been defined and discussed so many times by this court in recent years that

it seems almost unnecessary to cite authorities. While this court has never been willing to define with precision the limits of what may be construed to be due process of law, it has over and over again repeated that due process means only such process as recognizes the right of the owner to be compensated if his property be taken from him and transferred to the public. All that is essential is that a proper inquiry should be made as to the amount of compensation, and this constitutes "due process." There can be no question that this statute falls fully within these limitations.

C. B. & Q. R. R. *v.* Chicago, 166 U. S. 226.
Sweet *v.* Rechel, 159 U. S. 380 (to which case we would call special attention).

It is well settled that the federal courts ought not to interfere, especially with a statute which has been declared constitutional by the State Supreme Court, unless it clearly appears that there is some abuse of law amounting to confiscation of property or deprivation of personal rights.

Cass Farm Co. *v.* Detroit, 181 U. S. 396.

It is not necessary that there should be any particular mode of proceeding in the state court for the recovery of compensation.

Simons *v.* Craft, 182 U. S. 427.

The Fourteenth Amendment in no way undertakes to control the power of a state or to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for this purpose gives reasonable notice and affords fair opportunity to be heard before the issues are decided.

Iowa Central Ry. *v.* Iowa, 160 U. S. 389.

A large discretion is necessarily vested in the State Legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests.

Holden *v.* Hardy, 169 U. S. 366.

It is not necessary that compensation should be determined in advance of the taking. It is sufficient if any adequate provision for compensation is made. Proper inquiry as to the amount of the compensation constitutes due process.

Backus *v.* Fort St. Union Depot Co., 169 U. S. 557.

Due process of law is process according to the law of the land. This process is regulated by the law of the state.

French *v.* Barber Asphalt Co., 181 U. S. 324.

If this statute in question can be construed as an exercise of the power of taxation, the rule is still the same.

Davidson *v.* New Orleans, 96 U. S. 97.
Mobile *v.* Kimball, 102 U. S. 691.
Hagar *v.* Reclamation District, 111 U. S. 701.
Fall Brook Irrigation District *v.* Bradley, 164 U. S. 112.

V.

The Burden of Making Compensation was Legally Imposed on the City of Boston.

Nor does it make any difference with the constitutionality of the statute that the Legislature of Massachusetts has imposed the entire burden of this public improvement upon the city of Boston.

Sweet *v.* Rechel, 159 U. S. 380.
Willard *v.* Presbury, 14 Wall. 676.
Bauman *v.* Ross, 167 U. S. 548.
Webster *v.* Fargo, 181 U. S. 394.
Williams *v.* Eggleston, 170 U. S. 304.
Freeland *v.* Hastings, 10 Allen, 570.
Kingman, Petr., 153 Mass. 566.
Old Colony Railroad *v.* Framingham Co., 153 Mass. 561.

In this last named case the Supreme Court of Massachusetts says with reference to the provision for compensation in the statute under consideration in that case, "under the constitutions of several states, and probably under the decisions of the courts in some others, this provision for compensation would not be held sufficient, and a statute of this kind would be unconstitutional. But in this Commonwealth the law is settled differently."

In Kingman, Petr., the court examines at great length the power of the Legislature to impose the expense of a public improvement upon a particular locality, and determines that in Massachusetts, at least, this is entirely in accordance with the constitution.

It is familiar law, of course, that the decision of a supreme court of a state in construing its own constitution is binding on this court.

Iowa Central R. R. Co. *v.* Iowa, 160 U. S. 389.
Orr *v.* Gilman, 183 U. S. 278.

This court is bound to give the same meaning to a state statute as was given it by the supreme court of the state.

Stockard *v.* Morgan, 185 U. S. 27.
Missouri Pacific Ry. *v.* Nebraska, 164 U. S. 403.

It must be remembered that Massachusetts has a provision in its constitution in the Fourth Article, Section 1, Chap. 1, conferring upon the General Court full power and authority to make "all manner of wholesome and reasonable orders, the same to be not repugnant or contrary to the Constitution," and the Supreme Court of Massachusetts has said that this provision gives the Legislature a wide authority, and one more comprehensive than that found in the constitutions of other states.

Opinion of the Justices, 163 Mass. 589.
Turner *v.* Nye, 154 Mass. 579.
Kingman, Petr., *ubi supra.*

In Norwood *v.* New York, etc., R. R., 161 Mass. 259, the court says that the settlement of the expense of grade crossings in fixed proportions between the town, the state and the railroad company would not be a legitimate exercise of the power of taxation, but it was within the authority of the Legislature to enact all needful laws to provide for the convenience and safety of the public while traveling.

The Legislature of Massachusetts has even ordered a corporation to construct a fishway over its dam, although by its original charter it had constructed a dam without a fishway so as to destroy fishing rights, and had paid damages therefor.

Commissioners *v.* Holyoke Water Power, 104 Mass. 446.

It was argued in the state court that this statute in effect compelled the city of Boston to establish a park, and that it was not within the power of the Legislature to exercise such compulsion. This proposition, if correct, has no application to the present case, because it does not agree with the facts. It is to be remembered that Boston is the capital city of the Commonwealth of Massachusetts, and that the public buildings about Copley square are buildings in which the citizens of the entire Commonwealth have an interest. The gift of the Commonwealth to the city of Boston of the land upon which the Public Library was built was coupled with the agreement it should be open to all citizens of the Commonwealth free of charge. (Record, p. 27, referring to Chap. 222 of the Acts of the Legislature of Massachusetts for 1880.) The Art Museum is open to the entire public, and the Institute of Technology has been assisted by the Commonwealth on many occasions with grants of money in return for free scholarships open to citizens of the entire state.

The Legislature, apart from these considerations, had the entire right to promote the beauty and attractiveness of a public park in the capital of the Commonwealth, and to prevent unreasonable encroachments upon the light and air which it had previously received.

Knowlton *v.* Williams, 174 Mass. 476 (Rec., p. 57).

This is a public improvement for the benefit of the entire Commonwealth, the expense of which might properly have been charged upon the citizens of the Commonwealth, but which the Legislature had entire power to place upon the city of Boston.

The real point involved in this proposition must be, therefore, that the statute contains no constitutional provision for compensation, because there was no authority in the Legislature to impose such payment upon the city of Boston, but this point is not in any way governed or controlled by the provisions of the Fourteenth Amendment to the Constitution of the United States. It is purely and simply a question under the constitution of the state of Massachusetts whether such a provision by the Legislature is permitted by that constitution, and this is a question on which the decision of the state court is conclusive, and with which this court has nothing to do. It has been decided in Michigan that the legislature of that state cannot constitutionally compel a municipality to provide money to purchase and construct a park, but that was a question under the constitution of the state of Michigan, and the doctrine of the Michigan court has not been followed in Massachusetts. The Legislature of Massachusetts has imposed at various times a sewerage system, a water system, and a park system upon the city of Boston and the adjoining cities and towns, constituting what the Legislature have called a Metropolitan District, and the constitutionality of such statutes has been affirmed after careful consideration.

Kingman, Petr., 153 Mass. 570 (sewers).
Adams, Petr., 165 Mass. 497 (parks).
De Las Casas, Petr., 178 Mass. 213 (parks).

This proposition was raised upon the brief of the plaintiffs in error before the Supreme Court of Massachusetts, and was fully argued, and must, therefore, be considered to be determined against the plaintiffs in error, although the opinion of the court (Rec., p. 61) is silent on the point.

Respectfully submitted for the defendant in error,

SAMUEL J. ELDER.
EDMUND A. WHITMAN.